

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CELGENE CORPORATION,)	
)	
Plaintiff,)	
)	C.A. No.: N20C-05-145 EMD CCLD
v.)	
)	
HUMANA PHARMACY, INC.,)	
)	
Defendant.)	

Submitted: February 14, 2023¹

Decided: May 31, 2023

Upon Plaintiff's Motion for Partial Summary Judgment,

GRANTED

Upon Defendant's Motions for Summary Judgment on Liability and Damages,

DENIED

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Wilmington, Delaware, Brian D. Hershman, Esq., Jones Day, Los Angeles, California, Rajeev
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York, *Counsel for Defendant Humana Pharmacy, Inc.*

Davis, J.

I. INTRODUCTION

This is a breach of contract action assigned to the Complex Commercial Litigation
Division of this Court. Plaintiff Celgene Corporation (“Celgene”) commenced this action
against Defendant Humana Pharmacy, Inc. (“HPI”) on May 15, 2020. Celgene filed its First

¹ D.I. No. 132. The last filing in connection with this decision was on March 1, 2023. D.I. No. 139.

Amended Complaint (the “Amended Complaint”) on June 11, 2020.² HPI filed its Answer on March 23, 2021.

Celgene filed its Motion for Partial Summary Judgment for Count III of the Amended Complaint for Breach of Contract (the “Celgene MSJ”) on November 7, 2022.³ On the same day, HPI filed two separate motions for summary judgment for damages (the “Damages MSJ”) and liabilities (the “Liabilities MSJ”).⁴ HPI contends that it is entitled to both summary judgments as a matter of law because HPI’s assignment of its legal claims to HPI’s parent company, Humana Inc. (“Humana”), did not violate the anti-assignment clause of the Distribution and Services Agreement (the “Agreement”) between Celgene and HPI, and Celgene failed to sufficiently show that it is entitled to damages arising from the Kentucky suit. The Court held a hearing on the Celgene MSJ, the Liabilities MSJ and the Damages MSJ on February 14, 2023. At the end of the hearing, the Court took the matters under advisement.

For the reasons stated below, the Court will **DENY** the Damages MSJ and the Liabilities MSJ. The Court will **GRANT** the Celgene MSJ.

II. RELEVANT FACTS

A. PARTIES

Celgene Corporation is a Delaware corporation and pharmaceutical manufacturer.⁵

HPI is a Delaware corporation that purchases prescription drugs from, and provides services on behalf of, drug manufacturers and wholesalers.⁶ Humana is a health insurer incorporated in Delaware.⁷ Humana is the parent company of HPI.⁸

² D.I. No. 3.

³ D.I. No. 110.

⁴ D.I. Nos. 108, 109. HPI’s counsel for this action is divided into a “Damages Team” and a “Liabilities Team” filing separate MSJs, because some of Humana’s counsel in the Kentucky Action also represents HPI in the current action.

⁵ Amend. Compl. ¶ 3.

⁶ *Id.* ¶ 4.

⁷ *Id.* ¶ 13.

⁸ *Id.*

B. THE AGREEMENT

On July 1, 2013, Celgene and HPI entered into the Agreement for the distribution of Celgene-manufactured, FDA-approved drugs Thalomid ®, Revlimid ®, and Pomalyst ® (the “Drugs”).⁹ Under the Agreement, HPI filled patient prescriptions for the Drugs, which HPI purchased exclusively from Celgene.¹⁰ HPI also agreed to provide Celgene with a range of administrative services in connection with the Drugs, including maintaining a database which tracked all prescriptions and related patient information.¹¹ The Agreement was effective for three years.¹² Delaware law governs the Agreement.¹³

Under the Agreement’s terms, Celgene was responsible for timely shipping all medication orders to HPI, ensure that the drugs had the “optimum available expiration date,” and to pay HPI service fees calculated through performance metrics “such as how quickly HPI filled patients’ prescriptions.”¹⁴ Celgene also agreed that all the shipments of the Drugs to HPI would comply “with all applicable laws, regulations, directives and requirements of the FDA.”¹⁵

Agreement Section 14.2 provides that HPI agreed to indemnify Celgene for any third-party claims arising out of the Agreement:

[HPI] shall at all times during the Term and thereafter defend, indemnify and hold Celgene and its officers, directors, agents and employees harmless from and against any and all Claims incurred in connection with any third-party claim arising out of (i) the gross negligence or intentional misconduct of [HPI] or any of its officers, directors, agents or employees, (ii) breach by [HPI] of any of the terms of this

⁹ Amend. Compl. ¶ 8, Pharmacy Distribution and Services Agreement (“Agreement”) Preamble at 1. The parties’ briefings include Thalomid as one of the drugs included for distribution under the Agreement, but it is not listed in the Agreement.

¹⁰ *Id.* at 1, 3.

¹¹ Amend. Compl. ¶ 8, Celgene MSJ at 3. Other administrative services included contacting patients to provide counseling and education about the risks of the Drugs, inform Celgene of any adverse drug experiences suspected to be associated with the Drugs, and notify patients of any recalls of the Drugs. Celgene MSJ at 3-5.

¹² Celgene MSJ at 2.

¹³ *Id.* at 2.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

Agreement, or (iii) acts of [HPI] or any of its officers, directors, agents or employees which are outside the scope of this Agreement.¹⁶

The Agreement limits assignment. Agreement Section 17.4 (the “Anti-Assignment Clause”) limited HPI’s ability to transfer its rights and obligations under the Agreement:

This Agreement shall be personal to [HPI]. [HPI] shall not assign, sell, or otherwise transfer any of its rights and obligations (including but not limited to, by operation-of-law, mergers, transfer of assets, change-of-ownership, or change-of-control) under this Agreement without the prior written consent of Celgene, which Celgene may grant or deny in its sole and absolute discretion. In the event [HPI] attempt or otherwise enters into any agreement to assign, sell, or otherwise transfer this Agreement or any of its rights or obligations under this Agreement by way of any agreement or transaction which may involve any merger, transfer of assets, change-of-ownership, change-of-control or the like, Celgene shall have the right to immediately terminate this Agreement.¹⁷

Agreement Section 12.5 provides that Agreement Sections 14 and 17 survive termination or expiration of the Agreement.¹⁸

C. THE ASSIGNMENT

On January 4, 2018, Humana, HPI and thirty-one other subsidiaries and affiliates of Humana entered into an Assignment of Claims Agreement (the “Assignment”).¹⁹ Joseph C. Ventura²⁰ signed the Assignment for Humana and for “Schedule A Humana Subsidiaries.”²¹

Under the Assignment, HPI and the other subsidiaries and affiliates of Humana assigned their legal claims against Celgene (arising out of Celgene’s alleged off-label marketing of drugs) to Humana.²² Specifically, the Assignment Section 1 provides:

¹⁶ Agreement § 14.2.

¹⁷ *Id.* § 17.4.

¹⁸ *Id.* § 12.5.

¹⁹ Assignment of Claims Agreement (“Assignment”).

²⁰ Joseph C. Ventura is designated as the Enterprise Vice-President, Associate General Counsel & Corporate Secretary for Humana and for each of the “Humana Subsidiaries.” Assignment at 1.

²¹ HPI is listed as one of the Schedule A Humana Subsidiaries. Assignment at Sch. A.

²² Liability MSH at 7-8. HPI alleges that Celgene engaged in an “illegal campaign” in promoting the use of Thalomid ® and Revlimid ® for “off-label” uses, and that the off-label promotion scheme “caused third-party payors to pay for fraudulent Thalomid ® and Revlimid ® prescriptions, violating federal and state false claim laws.”

By virtue of their respective purchases of and/or extension of drug benefit coverage to Humana members for Thalomid ® and Revlimid ®, the Humana Subsidiaries may have claims under the Sherman Act, 15 U.S.C. § 1 *et seq.*, the Clayton Act, 15 U.S.C. § 15 *et seq.*, the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and/or analogous state statutes and the common law against Celgene Corporation (“Celgene”) in connection with Celgene’s off-label promotion of Thalomid ® and Revlimid ®, Celgene’s anticompetitive conduct in the markets for Thalomid ® and Revlimid ®, respectively, and related wrongdoing by Celgene (collectively, the “Claims”).²³

The Assignment does not specifically reference the Agreement; however, HPI purchased Thalomid ® and Revlimid ® from Celgene through the Agreement.²⁴

Assignment Section 2 states that “For good and valuable consideration received, the Humana Subsidiaries hereby irrevocably assign all rights, titles, and interest in the Claims to Humana.”²⁵

The parties agree that HPI did not obtain consent from Celgene prior to entering into the Assignment.

D. THE KENTUCKY LITIGATION

On May 16, 2018, Humana filed suit against Celgene in a Kentucky state court (the “Kentucky Action”).²⁶ Humana alleged that Celgene marketed the Drugs for off-label uses, and as a result, Celgene was liable for HPI’s distribution of the Drugs for such off-label uses.²⁷ Humana asserted claims for breach of contract, fraudulent inducement, negligent misrepresentation, unjust enrichment, and violation of New Jersey’s Racketeer Influenced and

In the ensuing federal action, *U.S. ex rel. Brown v. Celgene*, Celgene settled with the U.S. DOJ for \$280 million in 2017. Liability MSJ at 5-6.

²³ Assignment § 1.

²⁴ Agreement § 2.1.

²⁵ Assignment § 2.

²⁶ Celgene MSJ at 6.

²⁷ *Id.*

Corrupt Organizations (RICO) Act.²⁸ Humana, as the sole plaintiff of the suit, asserted that Humana has standing as the express assignee of HPI's causes of action under the Agreement.²⁹

Celgene moved to dismiss the Kentucky Action.³⁰ On January 15, 2020, the Kentucky state court denied Celgene's motion to dismiss.³¹ The Kentucky state court held that Humana had standing to bring the suit against Celgene due to HPI's power to assign its rights under the Agreement.³²

Here, HPI filed a motion to dismiss or, in the alternative, to stay this civil action (the "Stay Motion").³³ The Court denied the Stay Motion. Humana, in response to the Court's action, voluntarily dismissed all HPI-assigned claims in the Kentucky Action on March 31, 2021.³⁴ So, despite previously arguing the issue of standing, Humana ceased litigating the HPI-assigned claims. The Kentucky Action remains in active litigation over non-HPI-assigned claims asserted by Humana against Celgene.

E. PRESENT LITIGATION

On May 15, 2020, Celgene commenced this action against HPI.³⁵ In the Amended Complaint, Celgene alleges that HPI breached the Agreement by assigning its causes of action to its parent company, Humana, in violation of the anti-assignment clause.³⁶ Celgene alleges three claims against HPI: (i) a claim seeking a declaration that HPI breached the Agreement; (ii) a

²⁸ *Id.* at 6.

²⁹ *Id.* at 7.

³⁰ Liability MSJ at 9.

³¹ *Id.*

³² *Id.*

³³ D.I. No. 11.

³⁴ Celgene MSJ at 8.

³⁵ D.I. No. 1.

³⁶ D.I. No. 3.

claim seeking a declaration regarding the damages HPI owes to Celgene; and (iii) a claim for damages for breach of the Agreement.³⁷

On September 3, 2020, HPI filed the Stay Motion.³⁸ The Court denied the Stay Motion at the hearing held on February 12, 2021. The Court held that Celgene's complaint was sufficiently well-pled, finding that: (i) HPI failed to demonstrate that HPI's claims concerned a "breach of the whole contract" as required under the UCC for assignment of a cause of action despite the existence of an anti-assignment clause; and (ii) HPI failed to show that Celgene's alleged harm was not traceable to HPI's breach of the Agreement.³⁹

On November 7, 2022, Celgene filed the Celgene MSJ, seeking summary judgment on Count III – Breach of Contract.⁴⁰ Celgene contends that the Court should grant summary judgment because the Assignment is factually and legally a breach of the Agreement. Also on November 7, 2022, HPI filed the Liabilities MSJ and the Damages MSJ.⁴¹ In the Damages MSJ, HPI contends that Celgene's attorney fees and costs from the Kentucky Action are unreasonable because Celgene failed to distinguish the work completed for claims arising out of HPI's alleged breach of the anti-assignment clause from work completed for other validly assigned claims. In the Liabilities MSJ, HPI argues that the Agreement is a contract for the sale of goods. As such, the UCC applies and, under Delaware UCC 2-210(2), HPI's assignment of legal claims to Humana was permitted because Celgene breached the Agreement due to its off-label marketing of the Drugs.

³⁷ Celgene MSJ at 7.

³⁸ D.I. No. 11.

³⁹ Celgene MSJ, Ex. 4 (2/12/21 Hearing Transcript) at 62-63.

⁴⁰ D.I. No. 110.

⁴¹ D.I. Nos. 108, 109.

On December 7, 2022, Celgene filed responses to the Damages MSJ and the Liabilities MSJ.⁴² On the same day, HPI filed its response to the Celgene MSJ.⁴³ On December 21, 2022, Celgene replied to HPI's opposition to the Celgene MSJ⁴⁴ and HPI filed its reply to Celgene's oppositions to the Damages MSJ and the Liabilities MSJ.⁴⁵

III. PARTIES' CONTENTIONS

A. THE CELGENE MSJ

Celgene seeks summary judgment on Count III (Breach of Contract) of the Amended Complaint. Celgene argues that the Agreement and its anti-assignment unambiguously provide that HPI could not "assign, sell, or otherwise transfer any of its rights and obligations" without written consent from Celgene. Furthermore, Celgene maintains that the language of the clause stating "any of its rights and obligations" encompasses any of HPI's causes of action arising under the Agreement. Celgene contends that HPI breached the anti-assignment clause when HPI assigned its causes of action claims to its parent company, Humana, who filed suit in Kentucky against Celgene on those assigned causes of action. Celgene claims that it incurred, and continues to incur, damages from the litigation costs and fees arising out of the ongoing Kentucky Action.

Celgene also disputes HPI's argument that the UCC applies to the Agreement. Celgene argues that under 6 Del. C. § 2-102 and Delaware caselaw, when a contract "concerns more than the sale of goods," *i.e.*, a mixed contract, Delaware courts look at the factual circumstances surrounding the "negotiation, formation and contemplated performance" of the contract, as well

⁴² D.I. Nos. 116, 117.

⁴³ D.I. No. 115.

⁴⁴ D.I. No. 123.

⁴⁵ D.I. Nos. 122, 125.

as the “importance of the non-sales aspect of the contract.”⁴⁶ Celgene asserts that the non-sales aspects of the Agreement were central to the purpose of the contract. As such, Celgene claims the UCC should not apply because the Agreement was a service contract, not a goods contract. Additionally, Celgene argues that, even if the Court does find that the UCC applies, Celgene’s alleged actions involving promoting off-label use of the Drugs did not constitute a “breach of the whole contract,” necessary under UCC 2-210(2) for allowing an assignment of causes of action despite an agreement otherwise.

B. HPI’S MOTIONS

1. The Damages MSJ.

HPI contends that Celgene’s damage claims fail because Celgene’s time and billing entries are attributable to multiple causes of action in the Kentucky Action. HPI references the Court stating, in the October 11, 2022 Order, that “Celgene has its burden on damages and if this position is not viable/sustainable then it is possible that Celgene will not recover on time entries that cannot be broken down or more fully explained.”⁴⁷ HPI argues that Celgene failed to meet this burden. HPI notes that Celgene cannot provide a breakdown of the work that was done specifically for purposes of HPI’s assigned claims to Humana from that work done for other legal work that is not recoverable in this case.

HPI also argues that Celgene’s requested fees and costs are unreasonable under Rule 1.5 of the Delaware Lawyer’s Rules of Professional Conduct, because the amount sought by Celgene (over \$4.9 million) does “not commensurate with the limited amount of work Celgene’s counsel

⁴⁶ Celgene MSJ at 11 (citing *Neilson Bus. Equip. Ctr., Inc. v. Italo V. Monteleone, M.D., P.A.*, 524 A.2d 1172, 1174 (Del. 1987), *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. Coca-Cola Co.*, 696 F. Supp. 57, 84-85 (D. Del. 1988)).

⁴⁷HPI’s Motion for Summary Judgment (Damages Team) (“HPI Damages MSJ”) at 5 (citing the Court’s October 11, 2022 Order on Defendant’s Motion to Compel).

was required to perform” in drafting and addressing HPI’s alleged improper assignment for claims in the Kentucky Action.⁴⁸ HPI asserts that much of Celgene’s counsel’s time records and invoices are too broad and generic to be related to Celgene’s claims for HPI’s alleged violation of the anti-assignment clause in the present suit, and thus fatal to its claim for damages for breach of contract.

Additionally, HPI makes an argument that Celgene’s request for pre- and post-judgment interest should be denied because unless otherwise allowed by statute, etc., a party is not entitled to recover interest on attorneys’ fees and costs.

2. The Liability MSJ

On liability, HPI contends that HPI’s assignment of its causes of action was a valid assignment under Delaware law because the causes of action do not fall within the scope of the anti-assignment clause as neither “rights” or “obligations” arising out the Agreement. HPI maintains that the UCC should apply to the Agreement because the sale of goods dominated the transaction between the parties. HPI notes that HPI purchased \$1,124,626,818 in Drugs from Celgene between the period of 2010 to August 9, 2018, as compared with Celgene’s payments to HPI for related services amounting to only \$4,418,820 during the same period.

HPI also argues that the Agreement was a goods contract subject to the UCC and that the assignment of legal claims to Humana was permitted under UCC 2-210(2) due to a “breach of the whole contract.” HPI contends that the breach occurred when Celgene commenced an off-label marketing scheme involving the Drugs. Due to that breach, HPI could legally assign its damage claims to Humana despite the Agreement’s anti-assignment provision.

⁴⁸ *Id.* at 11.

Additionally, HPI claims that the Agreement's indemnification clause only required HPI to indemnify Celgene from "third-party" claims arising out of HPI's breach of the Agreement. Because HPI's assignment of causes of action to Humana was valid, Humana's claims against Celgene in the Kentucky Action were "first-party" claims, not "third-party."

IV. STANDARD OF REVIEW

The standard of review on a motion for summary judgment is well-settled. The Court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."⁴⁹ Summary judgment will be granted if, after viewing the record in a light most favorable to a nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.⁵⁰ If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the Court to apply the law to the factual record, then summary judgment will not be granted.⁵¹ The moving party bears the initial burden of demonstrating that the undisputed facts support his claims or defenses.⁵² If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for the resolution by the ultimate fact-finder.⁵³

⁴⁹ *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

⁵⁰ *Id.*

⁵¹ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *see also Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del. Super. Feb. 22, 1990) (citing *Ebersole*, 180 A.2d at 467) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.").

⁵² *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1970) (citing *Ebersole*, 180 A.2d at 470).

⁵³ *See Brzoska v. Olsen*, 668 A.2d 1355, 1364 (Del. 1995).

“These well-established standards and rules equally apply [to the extent] the parties have filed cross-motions for summary judgment.”⁵⁴ Where cross-motions for summary judgment are filed and neither party argues the existence of a genuine issue of material fact, “the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.”⁵⁵ But where cross-motions for summary judgment are filed and an issue of material fact exists, summary judgment is not appropriate.⁵⁶ To determine whether there is a genuine issue of material fact, the Court evaluates each motion independently.⁵⁷ And again, where it seems prudent to make a more thorough inquiry into the facts, summary judgment will be denied.⁵⁸

V. DISCUSSION

A. HPI’S MOTION FOR SUMMARY JUDGMENT FOR LIABILITY IS DENIED

1. The Agreement unambiguously prohibits assignment of any rights and obligations, including causes of action, absent Celgene’s prior written consent.

“Delaware adheres to the ‘objective’ theory of contracts, i.e.,[.] a contract’s construction should be that which would be understood by an objective, reasonable third party.”⁵⁹ “Contract terms themselves will be controlling when they establish the parties’ common meaning so that a

⁵⁴ *IDT Corp. v. U.S. Specialty Ins. Co.*, 2019 WL 413692, at *5 (Del. Super. Jan. 31, 2019) (citations omitted); *see Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super. May 31, 2013) (citing *Total Care Physicians, P.A. v. O’Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001)).

⁵⁵ Del. Super. Ct. Civ. R. 56(h).

⁵⁶ *Motors Liquidation Co. DIP Lenders Tr. v. Allianz Ins. Co.*, 2017 WL 2495417, at *5 (Del. Super. June 19, 2017), *aff’d sub nom.*, *Motors Liquidation Co. DIP Lenders Tr. v. Allstate Ins. Co.*, 191 A.3d 1109 (Del. 2018); *Comet Sys., Inc. S’holders’ Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. 2008); *see also Anolick v. Holy Trinity Greek Orthodox Church, Inc.*, 787 A.2d 732, 738 (Del. Ch. 2001) (“[T]he presence of cross-motions ‘does not act per se as a concession that there is an absence of factual issues.’” (quoting *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997))).

⁵⁷ *Motors Liquidation*, 2017 WL 2495417, at *5; *see Fasciana v. Elec. Data Sys. Corp.*, 829 A.2d 160, 167 (Del. Ch. 2003).

⁵⁸ *Ebersole*, 180 A.2d at 470-72; *Pathmark Stores, Inc. v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191 (Del. Ch. 1995).

⁵⁹ *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (citing *NBC Universal v. Paxson Commc’ns*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)).

reasonable person in the position of either party would have no expectations inconsistent with the contract language.”⁶⁰

“When the issue before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous.”⁶¹ Thus, the threshold inquiry on summary judgment is “whether the contract is ambiguous.”⁶² When a contract is “clear and unambiguous,” the Court “will give effect to the plain-meaning of the contract’s terms and provisions.”⁶³ “Ambiguity does not exist simply because the parties disagree about what the contract means.”⁶⁴ Instead, contracts are ambiguous “when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”⁶⁵

The parties are in dispute as to whether HPI is liable for a breach of the Agreement arising out of HPI’s assignment of its causes of action to Humana. The Court finds that the language of the Agreement is unambiguous. The Anti-Assignment Clause provides that HPI could not transfer or assign “...any of its rights and obligations...under [the] Agreement without the prior written consent of Celgene...”⁶⁶ The Court finds that the language of the Anti-Assignment Clause, while broad, is unambiguous.

HPI argues that the legal claims assigned to Humana were not within the Anti-Assignment Clause’s definition of “rights and obligations.” HPI contends that the language of the Anti-Assignment Clause “reflects the parties’ expectation that HPI could not assign its rights to ‘distribute and sell’ Celgene’s products, nor its obligations to ‘provide data reporting and other

⁶⁰ *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

⁶¹ *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

⁶² *Id.*

⁶³ *Osborn*, 991 A.2d at 1159-60.

⁶⁴ *United Rentals, Inc.*, 937 A.2d at 830.

⁶⁵ *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

⁶⁶ Agreement § 17.4.

services to Celgene.”⁶⁷ HPI also notes that the assignment to Humana was for “accrued, post-performance damage claims against Celgene, not any contractual right or obligations.” HPI relies upon *Partner Reinsurance Company Ltd. v. RPM Mortgage, Inc.*, a case from the Southern District of New York that interprets Delaware law. HPI contend this case supports its arguments that courts “regularly find that similar prohibitions on the assignment of contractual ‘rights’ or ‘interests’ do not bar assignment of post-performance contractual damage claims.”⁶⁸

Celgene opposes HPI’s interpretation of the anti-assignment clause, arguing that the Agreement unambiguously prohibited the assignment of the legal claims to Humana. Celgene also cites to a recent ruling from this Court, *PVP Aston, LLC v. Fin. Structures Ltd.*, which disagreed with the *Partner Reinsurance* court’s interpretation of Delaware law and affirmed that legal claims are within the scope of a party’s “rights and obligations” arising from a contract.⁶⁹

The Court finds Celgene’s arguments to be persuasive. The plain reading of the Anti-Assignment Clause broadly prohibits the assignment by HPI of “any of its rights and obligations.” The Anti-Assignment Clause does not contain any exceptions or limitations. HPI’s arguments that somehow a legal cause of action arising out of the Agreement is not within the scope of “rights and obligations” constricts the plain and unambiguous language of the Anti-Assignment Clause. Applying the objective theory of contracts, the Anti-Assignment Clause—as drafted and agreed to—can only be reasonably interpreted as prohibiting the assignment of legal causes of action within the scope of “rights and obligations.” As such, when HPI assigned

⁶⁷ HPI Liability MSJ at 15.

⁶⁸ *Id.* at 16 (citing *Partner Reinsurance Company Ltd. v. RPM Mortgage, Inc.*, 2021 WL 2716307 (S.D.N.Y. July 1, 2021)).

⁶⁹ Celgene’s Answering Brief in Opposition to Defendant’s Motion for Summary Judgment on Liability (“Celgene Liability Opp.”) at 9 (citing *PVP Aston, LLC v. Fin. Structures Ltd.*, 2022 WL 1772247, at *13-15 (Del. Super. May 31, 2022)).

its legal claims to Humana without prior written consent of Celgene, HPI breached the clear language of the Anti-Assignment Clause.

2. The UCC does not apply to the Agreement.

HPI argues that even if the Court finds that the assigned causes of action were within the scope of the Anti-Assignment clause, the UCC, specifically UCC 2-210(2), allows HPI to assign its rights under the Agreement to Humana. In essence, HPI contends it had the right to assign its legal claims to Humana due to Celgene's material breach of the Agreement despite the Anti-Assignment Clause.⁷⁰

Delaware courts have previously addressed the issues raised in this civil action. Under Delaware law, "When a mixed contract is presented, it is necessary for a court to review the factual circumstances surrounding the negotiation, formation and contemplated performance of the contract to determine whether the contract is predominantly or primarily a contract for the sale of goods. If so, the provisions of Article Two of the Uniform Commercial Code apply."⁷¹

HPI contends that the UCC should apply to the Assignment because the total value of the Drugs sold by Celgene to HPI was \$1.12 billion, in comparison to the \$4.4 million that HPI earned from the various services tendered to Celgene during the relevant timeframe; a ratio exceeding 250:1.⁷² HPI asserts that the services, including filling prescriptions, generating reports, and data maintenance, were "subordinate and ancillary to HPI's drug purchases[.]"⁷³ In turn, HPI relies on UCC 2-210(2) to argue that Celgene's marketing of the Drugs for off-label

⁷⁰ UCC 2-210(2) states: Unless otherwise agreed all rights of either seller or buyer can be assigned except where the assignment would materially change the duty of the other party, or increase materially the burden or risk imposed on him by his contract, or impair materially his chance of obtaining return performance. **A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation can be assigned despite agreement otherwise.** (emphasis added).

⁷¹ *Neilson Business Equipment Center, Inc.* 524 A.2d at 1174.

⁷² HPI Liability MSJ at 19.

⁷³ *Id.* at 20.

uses was a material breach of the Agreement equating to a “breach of the whole contract” which then permitted HPI to assign its right to damages “despite agreement otherwise” under UCC 2-210(2).

Celgene disputes HPI’s arguments that the UCC applies to the Agreement. Celgene contends that the Agreement was primarily designed to be a distribution agreement of the Drugs to patients, and the sale of the Drugs as goods to HPI was merely consequential and “only a single component of the Agreement.”⁷⁴ Celgene cites to Delaware caselaw to argue that Delaware courts often do not consider the numerical value of the services and goods provided under a contract when considering whether to apply UCC to a contract.⁷⁵ Celgene contends that the total value of the Drugs sold to HPI does not overcome the fact that the Agreement was entered into by the parties as a services contract, not a goods contract. As an alternative, Celgene argues that even if the UCC applied, HPI fails to meet the requirement under UCC 2-210(2) of showing a “breach of the whole contract” necessary for assignment of rights prohibited by the contract.

The Court finds that the UCC does not apply to the Agreement. The Court acknowledges that the Agreement contemplates the sale of the Drugs. However, when viewing the “factual circumstances surrounding the negotiation, formation and contemplated performance of the contract,” the parties also intended that the Agreement to be a service contract. For example, the Agreement’s actual name is Pharmacy Distribution and Services Agreement.⁷⁶ In addition, the Agreement’s preamble states:

WHEREAS Celgene is authorized to market and sell Revlimid ® (lenalidomide) and Pomalyst ® (pomalidomide) in the United States of America and its territories; and

⁷⁴ Celgene Liability Opp. at 13.

⁷⁵ *Id.* at 14.

⁷⁶ Agreement at 1.

WHEREAS Celgene desires to appoint certain pharmacy distributors to provide quality services to Customers (as defined herein) and to provide data reporting and other services to Celgene; and

WHEREAS Celgene and [HPI] wish to enter into this Agreement under which Pharmacy, registered under POMALYST REMS™ and REVLIMID REMS™ and (as defined below) will distribute and sell Revlimid® (lenalidomide) and/or Pomalyst® (pomalidomide) to Customers and will provide data reporting and other services to Celgene.⁷⁷

The language of the preamble unmistakably shows the intent of the parties to create both a service contract and a sales contract when they entered into the Agreement. The Agreement is absent of language typical of contracts intended solely for a sale of goods. Instead, the Agreement contains numerous clauses related to the services that HPI is required to tender to Celgene, such as data reporting, providing customer support for patients who are prescribed the Drugs, reimbursement related procedures for Customers.⁷⁸ Accordingly, the Court finds that the UCC does not apply to the Agreement because the Agreement is not predominantly or primarily a contract for the sale of goods.⁷⁹ The Agreement, as contemplated by parties, is a sales and services contract.

For these reasons, the Court will **DENY** the Liability MSJ.

B. THE COURT WILL DENY THE DAMAGES MSJ.

HPI argues that Celgene failed to show that the attorney fees and costs from the Kentucky Action are damages properly attributable to HPI purported breach of the Agreement. Specifically, HPI maintains that Celgene is unable to provide a breakdown of the work completed in the Kentucky Action as it relates to HPI's alleged breach of the Agreement versus

⁷⁷ *Id.* at 1.

⁷⁸ *See, e.g.*, Agreement §§ 4, 5.1 and 8.

⁷⁹ In addition to the services and sales references the Agreement's whereas clauses, the Agreement governs both sales and services. *Compare* Agreement § 2 *with* Agreement § 5.

the work completed on the other claims raised by Humana in the Kentucky Action. HPI contends that Celgene has already admitted its damage claim does not distinguish between work done for purposes of HPI's alleged breach of the Anti-Assignment Clause from work done for properly assignable claims.⁸⁰

HPI notes that the Court has already spoken on this issue in the October 11, 2022 Order. In that Order, the Court stated, "Celgene has its burden on damages and if this position is not viable/sustainable then it is possible that Celgene will not recover on time entries that cannot be broken down or more fully explained."⁸¹ HPI argues that Celgene's admitted inability to provide a further breakdown of the time entries, and refusal to produce any further evidence or witnesses to that effort is fatal to Celgene's damage claims, and as a result, HPI should receive summary judgment in its favor as to Celgene's damage claims.⁸²

Lastly, HPI contends that Celgene's claimed attorney fees and costs in the Kentucky Action are unreasonable and fail to satisfy the first and fourth factors of Delaware Lawyer's Rules of Professional Conduct Rule 1.5.⁸³ HPI asserts that Celgene's claimed \$4.9 million in attorney fees do not "commensurate with the limited amount of work Celgene's counsel was required to perform" in the case.⁸⁴

Celgene argues that contrary to HPI's claims that Celgene can only seek damages for the time spent on work unique to the improperly assigned claims, Celgene can validly claim "general fees" associated with the Kentucky Action. Celgene states that it is entitled to recover general

⁸⁰ HPI Damages MSJ at 5. Celgene admitted in its September 13 MTC Opposition that "the entries at issue involved overlapping claims and issues, and it is simply not possible (particularly years after the work was done) to provide a further breakdown."

⁸¹ *Id.* (citing the Court's October 11, 2022 Order on Defendant's Motion to Compel).

⁸² *Id.* at 9.

⁸³ HPI Damages MSJ at 10. The relevant Rule 1.5 factors are: 1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; 4) the fee customarily charged in the locality for similar legal services.

⁸⁴ *Id.* at 10-11.

fees under the indemnification clause of the Agreement because under Delaware caselaw, when a contract has an applicable indemnification provision, “the indemnitor is liable for any reasonable expenses incurred by the indemnitee in defending against [a claim for which the indemnitee is entitled to indemnification], regardless of whether the indemnitee is ultimately held not liable.”⁸⁵ In support, Celgene cites to *O’Brien v. IAC/Interactive Corp.*, where the Court of Chancery awarded an indemnitee 90% of its claimed general fees despite having no exclusive fees identified by the indemnitee.⁸⁶ Furthermore, Celgene contends that it already excluded nonrelevant fees attributable to claims falling outside of HPI’s improper assignment and, as such, the fees in contention here are fees specific to HPI’s breach of the Anti-Assignment Clause.⁸⁷ Celgene also maintains that under basic contract principles, Celgene is entitled to general fees because when the cost of third-party litigation is the harm itself, courts have treated attorney fees, costs, and expenses as recoverable compensatory damages.⁸⁸

The Court finds that there are genuine issues of material fact regarding Celgene’s claimed damages. The parties are in active dispute as to not only whether Celgene’s damages are reasonable, but the exact formulation of how the damages should be calculated, and whether Celgene’s claimed attorney fees and costs violate the Delaware Lawyer’s Rules of Professional Conduct Rule 1.5. Accordingly, after viewing the record in a light most favorable to a nonmoving party, the Court will **DENY** the Damages MSJ.

⁸⁵ Celgene’s Answering Brief in Opposition to Defendant’s Motion for Summary Judgment on Damage (“Celgene Damages Opp.”) at 9 (citing *E. Mem’l Consultants, Inc. v. Gracelawn Mem’l Park, Inc.*, 364 A.2d 821, 825 (Del. 1976)).

⁸⁶ *Id.* (citing *O’Brien v. IAC/Interactive Corp.*, 2010 WL 3385798, at *14 (Del. Ch. Aug. 27, 2010)).

⁸⁷ *Id.* at 13.

⁸⁸ *Id.* at 11.

C. CELGENE’S MOTION FOR PARTIAL SUMMARY JUDGMENT IS GRANTED.⁸⁹

The elements of a breach of contract claim are: “(1) the existence of a contractual obligation; (2) a breach of that obligation; and (3) damages resulting from the breach.”⁹⁰

Celgene argues that there was a valid contractual obligation under the Anti-Assignment Clause which prohibited HPI from assigning or transferring any of its “rights and obligations” under the Agreement to third parties without Celgene’s prior written consent. Celgene contends that HPI violated that contractual obligation when HPI assigned its causes of action to Humana without Celgene’s prior written consent. In turn, Celgene asserts it incurred damages because of Humana’s suit against Celgene in Kentucky. As discussed above, Celgene claims it is incurring attorney fees and costs which Celgene would not have suffered if HPI did not violate the Anti-Assignment Clause. Celgene also maintains that the UCC does not apply to the Agreement because the Agreement was a services contract, and as such, HPI cannot invoke UCC 2-210(2) to excuse its breach of the Anti-Assignment Clause.

HPI argues that it did not breach the Anti-Assignment Clause because the assignment of its causes of action to Humana was beyond the scope of the language of the Anti-Assignment Clause. HPI contends that the Anti-Assignment Clause only applies to rights and obligations *under* the Agreement, but not any legal claims or causes of action *related* to the contract.⁹¹ Additionally, HPI states that as the Agreement was predominantly a sales contract, it is subject to the UCC, and under UCC 2-210(2), HPI was permitted to assign its legal claims to Humana because Celgene’s off-label marketing “substantially impaired the Agreement’s value to HPI,

⁸⁹ As much of the relevant facts and discussion has been already addressed in previous sections, the following will offer a more concise recitation of the facts and analysis.

⁹⁰ *Buck v. Viking Hldg. Mgmt. Co. LLC*, 2021 WL 673459, at *3 (Del. Super. Feb. 22, 2021) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003)).

⁹¹ HPI’s Answering Brief to Celgene’s Motion for Partial Summary Judgment (“HPI Opp.”) at 14.

resulting in a breach of the whole contract.⁹² HPI also contends that in the alternative, Restatement permitted the assignment because Section 322(2)(a) of the Restatement allows an assignment of right to damages for a breach of the whole contract.⁹³ Lastly, HPI contends that Celgene failed to show harm arising from the assignment, arguing that the proximate cause of Celgene's incurrence of litigation fees and costs from the Kentucky Action was not HPI's assignment, but Celgene's own "illegal marketing practices."⁹⁴ HPI argues that Humana would not have filed the Kentucky Action but for Celgene's misconduct relating to its off-label marketing of the Drugs.⁹⁵

Here, the Court finds that there are no genuine issues of material fact as to whether HPI breached the Agreement. Moreover, HPI has not explained why the Restatement or other theories would over-ride a contractually agreed to obligation. The plain language of the Anti-Assignment Clause provides that HPI had a contractual duty to not assign any of its rights and obligations, including its legal claims/causes of action, to other parties without prior written consent of Celgene. Moreover, HPI has not explained why the Restatement or other theories would over-ride the plain language of a contractually agreed to obligation. HPI then assigned its legal claims to Humana, breaching the Anti-Assignment Clause. As a result of that breach, Celgene incurred (and continues to incur) damages in the form of litigation costs and fees arising from defending itself in the Kentucky Action.

Celgene has met the burden of showing that there are no genuine issues of material fact as to HPI's breach of the contract. As such, the Court find that, after viewing the record in light

⁹² *Id.* at 23.

⁹³ *Id.* at 26.

⁹⁴ *Id.* at 27.

⁹⁵ *Id.*

most favorable to HPI, no genuine issues of material fact exist, and the Celgene MSJ will be **GRANTED**.

VI. CONCLUSION

For the reasons stated above, the Court will **DENY** the Damages MSJ and the Liability MSJ. The Court will **GRANT** the Celgene MSJ.

May 31, 2023
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress